IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.55 OF 1994

Tukaram Anandrao Pawar
res. of Mukadamachiwadi,
Tal: Purandhar,
District : Pune ..Appellant

versus

1. Rajaram Anandrao Pawar,
since deceased through his
heirs and legal representatives

(a) Smt.Sarubai Rajaram Pawar

(b) Shri Atmaram Rajaram Pawar

both r/o/Velhe (Mukadamachiwadi),
Tal. Purandhar, District Pune.
Now.1(b) r/o. New Mill Road,
Chawl No.498, R.No.3,
Kurla, Bombay 400 070.

(c) Sau.Bebi Ashok Ingawale,
r/o. Chawl No.493,
Room No.3, Kurla,
New Mill Road,
Bombay 400 070.

2. Ramchandra Anandrao Pawar,
res. at Velhe,
Tal: Purandhar,
Dist: Pune.

3. Parvatibai Maruti Jagtap (Deceased)

(a) Bhau Maruti Jagtap,
res. of Bombay.

(b) Vithal Maruti Jagtap
(since deceased through his heirs
and legal reprsentatives)

(b-1) Rukmini Vithal Jagtap

(b-2) Jagannath Vithal Jagtap

(b-3) Rajendra Vithal Jagtap

(b-4) Rohidas Vithal Jagtap

all residing at Village Mahur,
Tal : Purandhar, Dist. Pune.

3(c) Dinkar Maruti Jagtap,
r/o. Mahur.

3(d) Sou Khasubai Shankar Shingate,
r/o. Mahur.

4. Dropadabai Sopanrao Bhosale,
since deceased through legal heirs
and representatives.

4a) Shri Sopan Dashrath Bhondave
deceased by legal heirs
4b, 4c and 4d

4b) Shri Bhagwan SOpan Bhondave

4c) Shri Rupchand Sopan Bhondave

Nos.4(b) and 4(c) residing at
Supe, (Raibag), Tal : Baramati,
Pune.

4d) Sou. Gulabchand Gajanan Wabale,
r/o. Deolgaon (Rasal),
Tal. Baramati,
Dist. Pune.

5. Hirabai Shripati Gaikwad,
r/o. Vaki.

6. Sarubai Karbe Jagtap,
r/o. Vaki,
Tal : Baramati.

7. Tarabai Ashok Taware,
r/o. Bombay.

8. Taibai Anandrao Pawar (deceased)
by her heirs Petitioner and

Respondent Nos.1 to 7

9. Bhagwan Keshav Pawar,
since deceased through heirs

9A. Baburao Bhagwant Pawar,
since deceased through his heirs
and legal representatives

9Ai) Smt. Yamunabai Baburao Pawar,
res. at & Post Velhe,
Mukadamchi wadi, Tal : Purandhar,
Dist: Pune.

9Aii) Shri Kalyan Baburao Pawar,
at & Post Velhe,
Mukadamachi wadi, Tal: Purandhar,
Dist: Pune.

9Aiii) Smt. Suman Mahadeo Kamathe,
Shivari, Takrarwadi,
Tal Purandhar,
Dist. Pune.

9B. Chandrabhaga Raghunath Shinde,
r/o. Bombay.

10. Balwant Keshavrao Pawar,
r/o. Mukadamachiwadi,
Valhe

11. Baburao Govindrao Pawar
r/o. Mukadamachi wadi,
Valhe

12. Kondiba Dagdu Pawar
r/o. Mukadamachi wadi
Tal : Purandhar

13. Soma Dagdu Pawar,
r/o. Mukadamachi wadi,
Tal: Purandhar,
Dist: Pune. ..Respondents

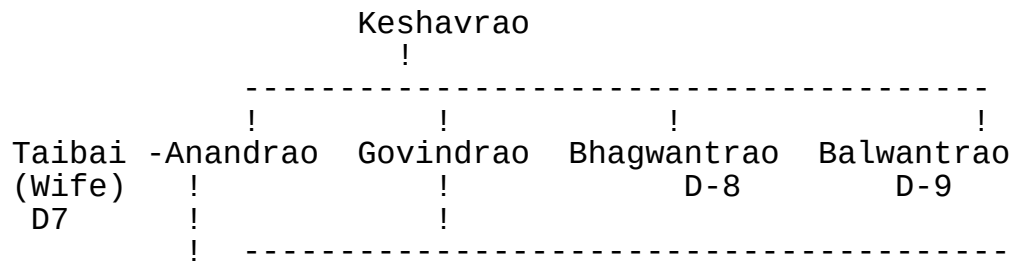
Mrs. Anita A. Agarwal for the Appellant
Mr.C.R.Dalvi with Mr. K.Y.Mandlik for the Respondent

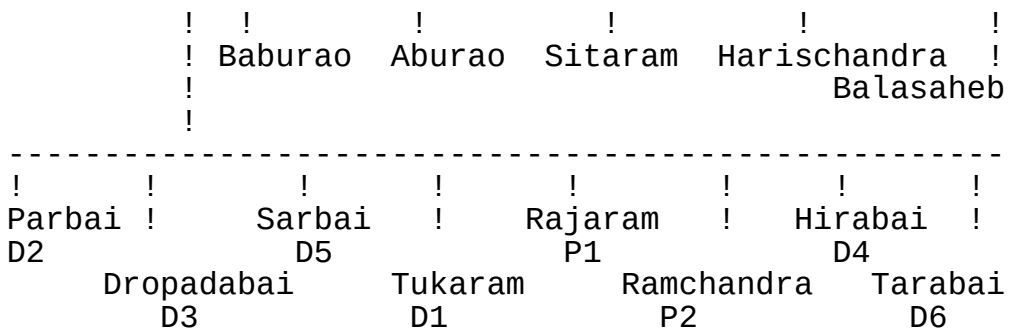
Coram : S.R.Sathe, J.
Dated : 4th Aug, 2006

JUDGMENT

1. Appellant, the original defendant No.1 in Regular Civil Suit No.174 of 1980 has preferred this appeal against the judgment and order passed by the Additional District Judge, Pune in Civil Appeal No.313 of 1989, whereby the judgment and order passed by the trial Court declaring that plaintiff Nos.1 and 2 have got 9/32 share each in the suit properties and defendant Nos.2,3,4,5 and 6 have got 1/32 share each in the suit properties and for partition and separate possession of the same was confirmed and the appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

2. In order to appreciate the facts giving rise to this appeal and the relation between the parties it would be worthwhile to reproduce the genealogy set out by the plaintiffs in the plaint.





According to the plaintiff the suit property mentioned in para 2(c) of the plaint is agricultural land bearing block No.5293, 5067 and 5290, situated at village Velle, was originally owned by Dwarkabai and Kamalabai Mandke. It was in possession of the plaintiff's forefather as a tenant. 32-G proceeding in respect of the said land took place and the purchase price of Rs.6000/- was paid by plaintiffs 1 and 2 and defendants 2 to 6. However, sale certificate was issued in the name of defendant No.1, he being Manager of the family. However, when dispute arose the present plaintiffs filed suit for partition against defendant No.1. It was Regular Suit No.128 of 78. According to plaintiffs the defendant No.1 agreed that he would give share of the plaintiffs in the suit land to them and hence plaintiffs withdrew the said suit. However, after the said withdrawal, the defendant No.1 actually did

not give the share of the plaintiffs. On the contrary, he started obstructing plaintiffs possession. Hence plaintiff filed Regular Civil Suit No.174 of 1980 on 20.8.1980 and claimed partition and separate possession of their 9/40 share (each).

3. The defendant No.1 filed his written statement at Exhibit 16 and admitted the relationship between the parties as disclosed by the plaintiffs. He, however, contended that the suit is bad for non joinder of parties as sons of Govinda, namely Bapurao, Balurao, Sitaram, Harishchandra and Balasaheb were not made parties to the suit though they were having share in the suit property. The defendant also contended that the plaintiffs unnecessarily joined Kondiba Dagdu and Soma and hence the suit is bad for misjoinder of parties. The defendant further contended that plaintiff did not include all the joint family properties as well as the amount of Rs.41,000/- which plaintiff had received. According to him defendant No.6, Tarabai was having a room at Bombay and the same also should have been included in the suit property.

4. The defendant also contended that the property mentioned in para 2(c) of the plaint was originally belonging to Dwarkabai and Kamalabai Mandke, and on the tillers date their father Anandrao was tenant. He died in the year 1960 and under such circumstances, price under Section 32G was not fixed at that time and thus Anandrao Pawar was not the owner of the property on 1.4.1957. He also contended that plaintiffs were serving at Bombay since the year 1940 and as such they were residing separately and not in possession of the suit land at any time. According to defendant No.1 after the death of his father he was actually cultivating the suit land as a tenant and plaintiffs were never tenants in the suit land. The defendant also contended that there was compromise between the landlord and him regarding the price of the land and accordingly he paid the said price on 23.11.1977 and 28.11.1977. He also denied plaintiffs allegation that the price that was paid to the owner was for and on behalf of the plaintiffs also. He specifically contended that the sale certificate was issued in his favour in his individual capacity and not in capacity as manager. Besides, this the defendant contended that as the earlier suit was

withdrawn by the plaintiff, the present suit is barred by resjudicata. Hence, on all these grounds the defendant No.1 prayed for dismissal of the suit.

4. The defendant Nos.8, 9 and 10 filed pursis Exhibit 14A and admitted the suit of the plaintiff. So also, defendants 3, 4, 5 and 6 supported the plaintiffs claim and also prayed that they also be given their share in the suit property.

5. On these pleadings, the learned trial Judge framed issues. In order to prove the suit claim the plaintiff No.1 examined himself at Exhibit 109 and produced certain documents. As against this, the defendant No.1 examined himself at Exhibit 144 and also produced several documents. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that defendant No.1 has failed to prove that the suit lands described in para 2(c) of the plaint which are his self acquired properties are not liable for partition. The trial Court also negatived the contention of the defendant No.1 that the suit is bad for non joinder of the necessary parties and misjoinder of the parties. It was also held that

suit is not barred by principal of resjudicata. The learned trial Judge came to the conclusion that each of the plaintiff is having 9/32 share in the suit land and they are entitled for partition and separate possession of the same. He, therefore, decreed the suit accordingly in favour of the plaintiff.

5. Being aggrieved by the said judgment and order, the original defendant No.1 filed Regular Civil Appeal No.313 of 1989. However, the same also came to be dismissed. Hence, the original defendant filed the present Second Appeal.

6. While admitting this appeal on 11.7.1994 this Court, (Coram: P.S.Patankar, J.) passed the following order:

> "Admit, as regards property 2(c) as mentioned in the plaint. The substantial questions of law are grounds 2, 9, 16 and 18"

The said grounds are as under:

2. That the substantial question of law involved in this Second Appeal is whether the certificate granted under Section 323M of the Bombay Tenancy Act is conclusive proof of title and the said certificate is issued to a person who is the tenant of the suit land as on 1.4.1957 or on the postponed date and other cosharers have no right to claim the share in the said land?

9. Both the courts below have miserably failed in not considering the fact that the price of the land fixed by the Tenancy Authorities under Section 32G of the Bombay Tenancy Act was paid by the defendant No.1 and therefore, he has exclusive title over the land and the other co-sharers have no right whatsoever in the said land.

16. It is an error to hold that the name of the defendant No.1 recorded in 32M certificate as the Manager of the joint family and, therefore, other co-sharers have share in the said land.

18. It ought to have been considered that though the fact that the 32M certificate stands in the name of Defendant No.1 the plaintiffs have not challenged the said certificate in the Tenancy Court on the ground that their name also be included in the said certificate being the heirs of the deceased tenant and as the same is not done the certificate has become final and, therefore, the plaintiffs have no right in the lands held by the defendant No.1 as tenant.

7. In this appeal before me, Smt. Agarwal, learned Advocate for the appellant, original defendant has urged only two points. Firstly, she submitted that the Courts below have not property appreciated the evidence on record and wrongly held

that the lands described in paragraph 2(c) of the plaint were held by the plaintiffs father as tenant and the defendant No.1's name was entered in respect of the said land as Manager of the joint family . According to her the plaintiffs were never in possession of the suit land. They were not cultivating the same. On the contrary, they were residing at Bombay and certificate issued under Section 32M of the Bombay Tenancy And Agricultural Lands Act , 1948 (hereafter referred to as B.T.A.L. Act) is a conclusive evidence to show that the suit lands described in para 2(c) of the plaint are exclusively owned by the defendant No.1. As against this, Shri C.R.Dalvi, the learned Senior Counsel for plaintiffs supported the judgment and order passed by the Courts below.

8. The relationship between the parties is not in dispute. Though there are several properties included in the plaint and several contentions were raised by the defendant regarding maintainability of the suit, while admitting the appeal, this Court has formulated the substantial questions of law and the same are pertaining only in respect of the suit property described in para 2(c) of the plaint.

9. It is not in dispute that the said lands were initially owned by Dwarkabai and Kamalabai. It is an admitted fact that for quite long time the plaintiffs were not actually cultivating the suit land and were serving at Bombay. However, that by itself is not sufficient to hold that after the death of original tenant, Anandrao, his sons do not inherit the said property as tenant. It is also an admitted fact that on the tillers date i.e. on 1.4.1957 the father of the plaintiff and defendant No.1, namely Anandrao was a tenant in the suit land described in para 2(c) of the plaint and he died in the year 1960.

10. It is true that in the instant case admittedly 32M Certificate was issued in the name of Defendant No.1. Relying on this it was vehemently argued on behalf of the defendant No.1 that this is a conclusive evidence to show that Tukaram alone is the owner of the said land. However, while considering this aspect we can not ignore the fact that initially the land was held as a tenant, not by Tukaram but by Anandrao i.e. the father of plaintiff and defendant No.1. Naturally, the

provisions under Section 40 of the B.T.L.A.Act were applicable. It would be worthwhile to see what section 40 of the B.T.L.A. Act states. It runs as follows:

> **Continuance to tenancy on death of tenant.** (1) Where a tenant (other than a permanent tenant) dies, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy.
>
> (2) Where the tenancy is inherited by heirs other than the widow of the deceased tenant, such widow shall have a charge for maintenance on the profits of such land.

11. Having regard to this provision it must be held that after the death of Anandrao his sons inherited the suit property. The defendant No.1 was infact holding the land or cultivating it for and on behalf of the legal heirs of deceased Anandrao. He was cultivating it as Manager. It is pertinent to note that even the defendant No.1 had also admitted before Tahsildar that plaintiffs are having right in respect of the suit land. The plaintiffs have produced at Exhibit 141 the certified copy of the application made by the defendant No.1 before

Tahsildar on 23.12.1978 in which he had requested that the names of the plaintiffs as well as his name be shown as owners. The defendant No.1 has not given any explanation about this document. So this document clearly indicates that plaintiffs are also having share in the suit lands described in para 2(c) of the plaint. Merely because for long time they were at Bombay, one can't jump to the conclusion that the plaintiffs were not willing to continue the tenancy. On the contrary, it seems that they were assertaining their rights and the defendant No.1 also recognised the same. So, there is no substance in the argument advanced by the learned Advocate for the defendant No.1. that under the circumstances, the plaintiffs had not acquired any right in the land which was initially held by Anandrao as a tenant.

11. From the material on record, the First Appellate Court has rightly held that the lands in question were held by defendant No.1 as Manager. Naturally, even though the certificate under 32M is issued only in his name, the same was for and on behalf of all the heirs of deceased Anandrao. The findings recorded by the courts below in this behalf

are unassailable. There is no reason to interfere with the same.

12. The substantial questions of law are only pertaining to the land described in para 2(c) of the plaint and from the above discussion it is very clear that merely because 32M Certificate was granted in favour of the defendant No.1 it does not mean that he became the exclusive owner of the same, particularly, when it is proved that he was holding the land as Manager and accordingly Mutation Entry was made. There is no substantial question of law framed with regard to the shares held by each of the plaintiff. The said point is also not urged by the learned Advocate for the defendant.

13. In view of the above, I have no hesitation to hold that the judgment and order passed by the Courts below is legal and correct. There is no substance in this appeal. Hence the appeal is dismissed. However, under the peculiar circumstances of the case, the parties to bear their own costs of this appeal.

(S.R.Sathe, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.55 OF 1984

Tukaram Anandrao Pawar
res. of Mukadamachiwadi,
Tal: Purandhar,
District : Pune ..Appellant

versus

1. Rajaram Anandrao Pawar,
& Others ..Respondents

Final Order:

13. In view of the above, I have no hesitation to hold that the judgment and order passed by the Courts below is legal and correct. There is no substance in this appeal. Hence the appeal is dismissed. However, under the peculiar circumstances of the case, the parties to bear the own costs of this appeal.

AFFIDAVIT

. I, Fatebahadur R. Singh, an adult, Hindu Inhabitant, residing at Chembur, Mumbai, do hereby state on solemn affirmation as under:

. I say that am owner of restaurant known as Triveni Restaurant and Bar situated at Chembur, Mumbai. I am holding Entertainment license and Premises License issued by the Commissioner of

Police, Mumbai.

. I say that I have made an application for amendment of the premises license to add the word "Orchestra" on the said license. Alongwith the said license I have annexed all the license and documents. Particularly the instalment granted by the Assistant Commissioner of Police, Chembur division, for payment of licence fees.

. I say that as per th said instalment order, I have paid the instalment amount and submitted the challan in the Office of Commissioner of Police, Mumbai. I hereby undertake to pay the balance instalment amount in time as granted by the Assistant Commissioner of Police, Chembur Division. I also undertake to abide by the order passed by the Commissioner of Police, to the show cause notice or any show cause notice which will be issued for the alleged breach of license condition if any.

. Whatever stated herein above is true and correct and I undertake to abide by the undertaking which is given by me herein above.

Solemnly affirmed at Mumbai,
this 7th day of August, 2006. DEPONENT.

"Identified by Me "

Advocate

BEFORE ME